No. 4084

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTHONY CARNEY,

vs.

Plaintiff in Error,

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA

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STATEMENT OF THE CASE.

This is an appeal from the United States District Court for the District of Montana, wherein there was judgment on conviction and sentence of the Plaintiff in Error on three counts of an information charging violation of the National Prohibition Act.

THE INFORMATION.

On May 26, 1922, the United States District Court for the District of Montana, granted leave to John L. Slattery, United States Attorney for said District, to file an Information against Anthony Carney, plaintiff in error, and hereinafter called the defendant, charging him with a violation of the National Prohibition Act in five counts. Attached to the Information were two affidavits of Charles Rodda and Sam Fairchild, Police Officers of the City of Butte, Montana.

The first affidavit, sworn to on the 9th day of May, 1922, quoting the charging part only, is as follows:

> "That they went * * to premises 205 West Quartz Street, and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallons of mash in a state of fermentation, a quantity of white moonshine whiskey, one 12-gallon still and connections.
>
> That they then arrested Anthony Carney and brought him to Police Station, Anthony Carney being owner of premises, occupying same, and having full control of same.
>
> Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections." (Tr. 6 and 7).

The second affidavit of these officers, sworn to on the 24th day of May, 1922, quoting the charging part only, is as follows:

> "That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the City of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquor." (Tr. 7 and 8).

The defendant was found guilty in manner and form as charged in the information as to Counts Three, Four and Five, which are set out in full in the Transcript, pp. 3-5.

LEAVE GRANTED TO FILE INFORMATION PROPER.

The first affidavit supra, made by officers having knowledge of the facts, reciting that the officers upon entering the premises at 205 West Quartz Street noticed a very strong odor of mash, the discovery of a 12 gallon still and connections, a half gallon of white moonshine whiskey therewith, and 75 gallons of mash in a state of fermentation,—which, with the fact, stated in the affidavit, that Anthony Carney was the owner, occupying

and having full control of the premises, was sufficient probable cause without more to move the Court in directing the information to be filed and ordering that a warrant of arrest issue for the defendant, Anthony Carney.

PROOF OF PROBABLE CAUSE FOR WARRANT OF ARREST TO ISSUE.

To cause a warrant of arrest to issue, the information must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof.

U. S. v. Baumert (D. C. N. Y.) Ray, D. J. 179 Fed. 735.

U. S. v. Wells (D. C. Tenn.) 225 Fed. 320.

It is only where it is sought to issue a warrant that the Constitution requires that the affidavit must be by one knowing the facts; therefore, as there is no statute requiring the verification of an information, an information is not open to attack because verified on information and belief.

Brown v. U. S. (9 C. C. A.) 257 Fed. 703;

Weeks v. W. S. (2 C. C. A.) 216 Fed. 292;

Cert. denied. Weeks v. U. S. 235 U. S. 697.

See also—Kelly v. U. S. (9 C. C. A.) 250 Fed. 947.

THE CASE PRESENTED.

The defendant, Anthony Carney, owns and with his family has resided at his residence located at 205 West Quartz Street, Butte, Montana, for eight years past. The residence faces south and is a five-room frame cottage or house with cellar. A hallway, about four feet wide, dividing the rooms, runs through the house with three rooms on the west side of the hallway and two on the east side with toilet and bath room. Each room has a door opening into the hallway.

On April 18th, 1922, Fred Bolton, a gas meter inspector of Butte, called at the 205 West Quartz Street residence to read the meter. On knocking at the door, Mrs. Anthony Carney, wife of the defendant, came to the door and upon ascertaining the business of Inspector Bolton refused him admission, directing him to "wait a minute." After waiting about 20 minutes, the Inspector left, returning about half an hour later with Charles Rodda and Sam Fairchild, police officers of the City of Butte. Officer Rodda went to the front while Officer Fairchild and Inspector Bolton went to the rear door. (Tr. 77-8).

A strong odor of mash was noticed by Officer Rodda when he came to the front door. (Tr. 83

and 124). A like smell of mash in a state of fermentation was noticeable throughout the house. (Tr. 91).

The door of the kitchen on the east side of the hallway was partially open and through it the officer saw a still. (Tr. 82-3). Pushing the door further open and going in, the still was found on a stove with mash and about half a gallon of moonshine whiskey. (Tr. 84, 89). In the other room was a bed, a fifty gallon barrel and a ten gallon keg of corn mash in a state of fermentation, ready to run through a still. (Tr. 90 and 124). These two rooms on the east side of the hallway contained only the stove, the still, the whiskey, mash, a bed and a chair or two. No table, dishes, food, groceries, clothing or other articles or utensils for domestic us. (Tr. 85, 90). Mrs. Carney was the only person about the house, the defendant not being at home at the time. The next day the defendant was placed under arrest as he came into the house from work. (Tr. 84).

COUNSEL MOVE FOR DIRECTED VERDICT OF "NOT GUILTY".

A re-statement.

At 205 West Quartz Street, Butte, Montana, on April 18, 1922, property designed for and used in the unlawful manufacture of intoxicating liquor was found. There was a 12 gallon still and con-

nections, the manufactured product, and 60 gallons and more of corn mash, in a state of fermentation, ready to run through a still,—all in a house owned, occupied and under the control of the defendant for six or eight years past. No one present or about the premises except the wife of the defendant. She admitted the officers and as they came into the hall a very strong odor of mash permeated the atmosphere. Through the partially opened door of a room on the East side of the hall, a still was seen and all the necessary adjuncts to the manufacture of moonshine whiskey was found .

Thus the evidence of the Government in chief, Thereupon counsel for defendant moved the Court for a directed verdict of "Not Guilty".

A stronger chain of circumstantial evidence pointing to Anthony Carney as the guilty party could hardly be imagined. So must have felt the Court. Hence his remark in denying motion of counsel for a directed verdict: "The evidence is enough to hang a man if he was on trial for murder." (Tr. 79 to 91.)

IN THIS THE COURT COMMITTED NO ERROR.

This remark was not made by the Court in his charge to the jury, nor to the jury at all. Simply made within their hearing, but directed to counsel for defendant. Nor was the language of the Court

excepted to. The exception only extended to the denial of the motion for a directed verdict. (Tr. 91.)

The final issue of guilty or not guilty, after the introduction of all the evidence, was specifically left by the Court, in his charge, to the honest judgment of the jury. In a dozen places and more, in the charge to the jury, the Court impressed the thought upon the jury that it was their verdict, their honest judgment that was to decide the case.

At the very outset of the charge, the Court bade the jury remember that court and jury have a divided function and duty.

> "Mine," said the Court, "is to tell you what the law is that applies to the case and you always accept the law from the court; but your function and duty is to determine the truth where the facts are in dispute and where different inferences may be drawn. Remember while you take the law from me you don't take the facts from me. I might tell you out and out whether or not I think the defendant guilty, I may comment on witnesses and evidence, but even if I did it wouldn't bind you to come to the same conclusion nor would it be said to bring you to the Court's conclusion but only to help you to reason to a correct decision." (Tr. p. 126.)

A FEDERAL DISTRICT JUDGE NOT A MERE AUTOMATON.

A Federal District judge presiding at a trial, civil, or criminal, in any court of the United States, may express his opinion to the jury upon the questions of fact which he submits to their determination.

Simmons v. U. S., 142 U. S. 148.

The objection that the charge unduly emphasized the evidence of the plaintiff, so that the court's opinion would necessarily be inferred from the language, does not require reversal, where the Court stated that his charge was only for the purpose of suggesting the method of consideration.

Calcutt v. Gerig (6 C. C. A.) 271 Fed. 220.

> "The jurymen were told repeatedly that they were to deside the questions of fact upon their own judgment, and that the comments of the Court upon the facts were not binding upon them. This was not error, for in the United States Courts the judge may comment on the evidence, call the jury's attention to parts of it that he thinks important, and may express his opinion upon the facts, provided he finally leaves the decision of the questions of fact to the jury."

Little v. U. S. (8 C. C. A.), 276 Fed. 915-6.

> "The rule is well settled in the federal courts that the judge may comment on the evidence and express his opinion of the facts in the case, and advise the jury of his conclusions thereon, provided the jury is given to understand that it is not bound by the judge's expression of opinion."

Caudle v. U. S. (8 C. C. A.), 278 Fed. 710-12.

In the case of Dillon v. U. S. (2 C. C. A.), 279 Fed. 639, in the course of his charge, the District Judge used the following language:—

> "Now you have heard this case. The Court's opinion is that the defendant is guilty of the crime charged."

but leaving the final decision as to guilt or innocence solely to the jury as in the charge in the case at Bar, supra. The expression of the court's opinion of defendant's guilt was held not to be error. In the opinion by Rogers, C. J. supra at p. 643, it is said:

> "But, whatever the rule may be in the State courts, it is well established law, which the court has no right or inclination to depart from, that in the federal courts the trial judge is entitled to express his opinion upon the facts and the guilt or innocence of the accused, provided the jury is given unequivocally to understand that it is not bound by the expressed opinion of the judge."

See also Horning v. District of Columbia, 254 U. S. 135.

DeJianne v. U. S. (3 C. C. A.), 282, Fed. 737.

> "In the Courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in a country in which the modern jury trial had its birth."

Graham v. U. S., 231 U. S. 474-80.

THE INFORMATION—NEGATIVE ARGUMENTS.

Counsel for defendant in his brief (p. 48) argues:—

> "In the pleading in the case at bar, the Government has failed to include any defensive negative averments or to state "that the act complained of was then and there prohibited and unlawful," as a result of which, we submit the pleading is insufficient in so far as the third count and that portion of the fifth count in which it is charged that the defendant maintained a nuisance, "that is to say, a place and building where intoxicating liquor was kept," is concerned.—"

citing a decision by the District Court for the Southern District of Alabama,—

U. S. v. Cleveland, 281 Fed. 249.

In that case it was charged that the defendant—

> "did unlawfully have and possess, to-wit, 33 half pints of illicit liquor intended for use in violation of Title 2 of the National Prohibition Act passed October 28, 1919; that is to say, intended for use as intoxicating beverages, which was then and there prohibited and unlawful."

The Court in its decision quoted Section 32 of the National Prohibition Act. The part thereof germane hereto reads as follows:—

> "It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

Construing this section and particularly the sentence above, reading,—

> "But it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

the court say:—

> "What was meant by "then and there", unless it was the time and place when the liquor

> was possessed by the defendant? Must not the indictment then state this time and place? If so, this would not be a negative or defensive averment, but a positive one. As long as the act recognizes the right of possession and use at certain places, and makes such possession illegal only at other places, then an indictment, to be sufficient, should state a *time and place* where the possession was illegal." (Italics supplied.)

Now take the information, Third Count. It reads—

> "That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 West Quartz Street, in the City of Butte, in the County of Silver Bow, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act; contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America."

The possession of intoxicating liquor is made unlawful by the National Prohibition Act. That part germane hereto reads as follows

> Title 2, Sec. 3. "No person shall on or after the date when the Eighteenth Amendment to

> the Constitution of the United States goes into effect, *** possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

POSSESSION OF LIQUOR PRIMA FACIE ILLEGAL.

The possession of liquors after February 1, 1920 is made prima facie evidence of illegal purpose. Sec. 33 of the Act applicable hereto reads as follows:—

> "After February 1, 1920, the possession of liquor by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

True the count does not carry the phrase "was then and there prohibited and unlawful". It alleges, however, "did then and there wrongfully and unlawfully have and possess", etc.

In an indictment charging in separate counts conspiracy to "unlawfully possess", to "unlawfully transport", and to "unlawfully sell" intoxicating liquor prohibited by law, the word "unlawfully" sufficiently excludes the exceptional cases in which

liquor may be lawfully possessed, transported, or sold, under National Prohibition Act, Sec. 3.

Rulovitch v. U. S. (3 C. C. A.), 286 Fed. 315.

Under these sections, the decision last above and U. S. v. Cleveland, supra, the Third Count of the information is clearly sufficient.

What is said here with reference to the Third Count applies with equal force to the Fifth Count of the information. The sufficiency of the Fourth Count is passed by or not questioned.

AVERMENT OF PRIVATE DWELLING.

It is easy to be seen, however, that the real thought in the mind of counsel for defendant, in his objection to the sufficiency of the information for that "the Government has failed to include any defensive averments" in his desire to have had the information charge that the defendant "did" *** have and possess intoxicating liquor intended for use *in his private dwelling* in violation" etc.

Counsel in his brief (p. 46) actually goes so far as to quote a part of Section 33 of the Act with reference to the possession of liquors in one's private dwelling, to-wit:—

> "It shall not be unlawful to possess intoxicating liquors in one's private dwelling while the same is used and occupied by him as his dwelling only, and such liquor need not be re-

ported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein."

Would counsel go so far as to say "intoxicating liquors may be manufactured in one's private dwelling while the same is used and occupied by him as his dwelling only, and the possession of such manufactured liquor lawful and need not be reported provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein?"

It must be so for in the case at Bar it is liquor manufactured where there was a still and connections and corn mash in a state of fermentation, of very strong odor, "ready to run through a still,"—all in a house owned, occupied and controlled by the defendant for six or eight years past that counsel now argues it is lawful to possess in "one's private dwelling".

THE DEFENSE.

Yet counsel defended his case on the theory that the rooms containing the still and connections, whiskey and mash had been rented to one Pat O'Donnell and that the defendant did not know anything about it. Verily, any port in a storm.

TESTIMONY OF THE DEFENDANT.

The testimony of the defendant in chief pertinent hereto is as follows:

"Q. Have you ever used the rooms on the east side of that hall except for renting?

A. That's all to rent.

Q. Were those premises, that is the two rooms on the east side of the hall rented in April, 1922?

A. Yes. sir.

Q. Who had charge of the renting of those rooms?

A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922,

A. This man O'Donnell.

Q. Did you rent the premises to him?

A. No. I didn't rent them.

Q. Do or did you know he was making moonshine in those premises?

A. I should say not.

Q. Did you know there was a still in the building at all.

A. No. sir.

Q. Did you know there was any mash in the building?

A. No, sir.

Q. Now, Mr. Carney, were you home the the time the officers called on the 18th?

A. No, sir.

Q. Where were you at that time?

A. I was at the mine working.

Q. At work? A. Yes, sir.

Q. And when you returned home what time was it?

A. About five o'clock in the evening.

Q. Did you see any officers that day? A. Yes.

Q. Who did you see?

A. Mr. Rodda that testified here and Gerry.

Q. Rodda and Gerry up on the 18th?

A. Yes, sir; after I came off shift they were waiting and came into the house right after me." (Tr. 118-119.)

And on cross-examination:—

"Q. You were maintaining this house at 205 West Quartz Street on or about the 18th

of April last year?

Mr. BALDWIN.—Objected to as immaterial; not proper cross-examination.

The COURT.—Ask him if he owned it.

Q. You owned it did you not? A. Yes, sir.

Q. Kept it in repair? A. Yes. sir.

Q. And occupying one side? A. Yes, sir.

Q. In going-in entering your house did you generally go in the front door or back door?

A. Sometimes either way.

Q. You would pass the kitchen where the still was?

A. Yes, sir.

Q. How close would you come to that door?

A. Come right by it.

Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that? A. Gerry and Rodda.

Q. Until they told you you never suspected

the still there?

A. No, sir.

Q. Did they tell you also there were seventy gallons of mash? A. They told me they found it.

Q. You never smelled mash?

A. No, sir.

Q. You don't have any trouble with your sense of smell?

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

Q. Did it surprise you to learn that that still there and seventy gallons of mash and moonshine whiskey were in a room the door of which you almost touched with your elbow two or three days in passing it.

A. Yes, sir; it surprised me." (Tr. 119-121.)

THE COURT'S CHARGE TO THE JURY.

The Court charged the jury clearly and properly:—

"You are the exclusive judges of the weight of the testimony and credibility of the witnesses. You see the witnesses, you hear them

> and observe and take note of their attitude and demeanor. Are they frank and fair or inclined to conceal or distort or misrepresent; do they contradict themselves or are they contradicted by others whom you prefer to believe; are they contradicted by circumstances which so far appeal to your reason that you prefer to believe them rather than the direct statements of any number of witnesses: have they an interest in the case. Circumstances may speak truly where witnesses are testifying untruly."

The jury observed the witness, his manner in testifying, his demeanor on the witness stand. The jury had the unquestioned right to consider the manner in which the defendant, a witness, testified. Does he appear to testify in a candid, open and fair manner? What is his attitude? Are his answers to questions direct or evasive? Is the testimony given in a way to enlighten or to deceive the jury?

Defendant was asked by his counsel at the trial the direct question—

> "Have you ever used the room on the east side of that hall except for renting?

His answer was not direct nor frank, but—

> "That's all to rent."

Was he candid in his testimony to the jury or did he seek to hide behind the skirts of his wife?

His counsel questioned him:—

"Q. Who had charge of the renting of those rooms?

A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922?

A. This man O'Donnell."

Here was a man who worked at mining. Putting in his eight hour shift, returning home about five o'clock in the afternoon. Would pass the kitchen where the still was. Would come right by the kitchen door.

"Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that?

A. Gerrey and Rodda.

Q. Until they told you, you never suspected the still there?

A. No, sir.

Q. Did they tell you also there were seventy

gallons of mash?

A. They told me they found it."

Yet that hallway was redolent with the odor of mash. He is questioned:—

Q. You never smelled mash?

A. No, sir.

Q. You don't have any trouble with your sense of smell?

Here is a way out—and the defendant quickly seizes upon it. He answers—

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

The very recital of the defendant's testimony in cold type is not impressive. How much less must it have been to the jury under the circumstances of this case. If the defendant's sense of smell was so defective, it seemingly would have been easy to prove it. Had he ever been treated for it? Did his wife know of it? No one else testified to it. When asked if he had any trouble with his sense of smell, defendant answered as though he saw a loop hole of escape—a way out, and answered—"Well, it isn't the very best". And to cinch it, said, "It never was good".

To the jury such testimony was not candid and

frank, but evasive, with all the earmarks of being untrue.

What did this defendant do after returning home at five o'clock of an afternoon? The house contained only five rooms. To get to the toilet or bathroom, the hallway must be used. The kitchen on the west side of hall was opposite that of the room in which the still was kept. The door of that room was partially open and through it the officer saw the still. It is inconceivable that in such a place, the residence of the defendant, under all the facts and circumstances testified to, that this defendant knew nothing of it.

Is it to be held that a defendant charged with a violation of the National Prohibition Act is to "get by" by a mere disclaimer of knowledge as to things going on in his narrowly confined residence? That, therefore, the law making—(Sec. 21 of the Act)

> "Any room, house, *** or place where intoxicating liquor is manufactured, *** kept *** in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, *** a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1000 or be imprisoned for not more than one year, or both."

does not apply to him?

In the light of the testimony and all the circumstances of the case, well did the Court charge the jury,

> "You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or entertain a reasonable doubt, but you are not to be gulled." (Tr. 132.)

However unpleasing to the sensitive ear of counsel, the Court used language expressive and easily understood. To 'hoodwink' is "to deceive by false appearance; impose upon; to dissemble." To 'bamboozle' is to "deceive" and "mystify" and to be 'gulled' is to be "duped".

The Court did not say the jury was being 'hoodwinked, bamboozled and gulled'. They were told not to be. In other words, it was a forceful and expressive way to bring home to the jury their duty to consider and think and reason about the case. They were not to be hoodwinked, "blinded" by unreasonable testimony if it is unreasonable".

Always the Court is careful to leave it to the judgment of the jury.

> "You are not to believe a thing is so simply because some one swears it's so. *** You determine the true and false no matter from what witness the evidence comes." (Tr. 133.)

THE DEFINITION OF A REASONABLE DOUBT.

The Court in its charge gave full explanation of a reasonable doubt as follows:

> "After reviewing the facts and circumstances and the direct testimony of the witnesses in the case you may have some doubt as to the guilt of the defendant but unless a doubt is reasonable in view of all the circumstances you are bound to find him guilty; at the same time you may have a doubt of his innocence but that does not enable you or justify you to find him guilty unless you have no reasonable doubt of his guilt. A reasonable doubt may be defined after this fashion; if after you have reviewed all the evidence you do not have a judgment that persists in staying with you, that to a very high degree of probability the defendant is guilty, you have a reasonable doubt and must acquit him. On the other hand if after reviewing all the evidence and circumstances your judgment persists that to a very high degree of probability the defendant is guilty you have no reasanable doubt and you are bound to convict him. When I say bound, Gentlemen, there is no compulsion from the Court or anyone; the only things binding upon you are your oath, duty, honor and conscience. You are officers of the Court as you sit there, sworn to perform your duty as honest and conscientions men." (Tr. 128-9.)

The foregoing definition of a reasonable doubt by the District Court in almost identical wording has been heretofore approved by this Court.

McCurry v. U. S. (9 C. C. A.), 281 Fed. 532.

The Plaintiff in Error was duly tried, convicted and sentenced.

WHEREFORE, Defendant in Error respectfully submits that the conviction and judgment of the District Court should be affirmed.

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